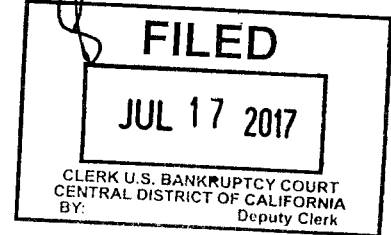


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9 UNITED STATES BANKRUPTCY COURT  
10 CENTRAL DISTRICT OF CALIFORNIA  
11 LOS ANGELES DIVISION

12 In re  
13 MARK ELIAS CRONE,  
14 Debtor;  
15 JEFFREY A. RINDE and CKR GLOBAL  
16 ADVISORS, INC.,  
17 Plaintiffs,  
18 -vs-  
19 SUSAN CRONE, GARY GORHAM and  
20 LEONIDAS P. FLANGAS,  
21 Defendants.

Case No. 2-17-bk-12392-BR

Chapter 7

Adv. No. 2:17-ap-01289-BR

**DEFENDANT GARY J. GORHAM'S  
REPLY IN SUPPORT OF HIS  
SPECIAL MOTION TO STRIKE;  
SUPPLEMENTAL DECLARATION  
OF GARY J. GORHAM AND  
EXHIBIT <sup>1</sup>**

**(Filed concurrently with Reply  
Supporting Motion to Dismiss for  
Failure to State a Claim)**

**Hearing**

Date: July 25, 2017

Time: 10:00 a.m.

Ctrm: 1668

Judge: Hon. Barry Russell

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26 <sup>1</sup> Filed non-electronically pursuant to Local Rule 5005-4(c)(2)(a) and Section 3.11(c)(1) of the  
27 Court Manual of the United States Bankruptcy Court for the Central District of California (eff.  
28 April 2017).

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**MEMORANDUM OF POINTS AND AUTHORITIES OF GARY GORHAM**

**I.**

**INTRODUCTION**

Plaintiffs oppose the special motion to strike by making two arguments. Neither is meritorious.

**A. Assertion that “aiding and abetting” communicative conduct is not privileged.**

The first argument made by plaintiffs is essentially an assertion that the communicative conduct and negotiations by Mr. Gorham aided and abetted a theft and, therefore, the communications are not privileged. While as a matter of fact Mr. Gorham’s conduct did not abet anything (as it turns out defendant Leonidas Flangas, defendant Susan Crone’s lawyer, had and has possession of the stock certificate), the litigation privilege immunizes Mr. Gorham’s communicative conduct from any tort claims. It is also uncontradicted that Mr. Gorham was relaying incorrect information his client had told him, so this argument is factually inaccurate as well as factually impossible.

It remains clear that plaintiffs are suing Mr. Gorham because Mr. Gorham was acting as lawyers generally do – engaging in communications about litigation with opposing counsel in connection with representing his client’s interests.

As the cases cited by Mr. Gorham in his moving papers demonstrated, the litigation privilege embodied in Civil Code § 47(b) absolutely immunizes Mr. Gorham’s statements. The only exception to the absolute privilege is when the defendant is sued for malicious prosecution.

In short, if California law applies, the privileged nature of the communications cannot provide plaintiffs with “evidence” of any actionable misconduct, and Mr. Gorham’s special motion to strike under C.C.P. § 425.16 should be granted. As it turns out, Mr. Gorham’s communications were also privileged under New York law, but plaintiffs did not brief New York law on that issue, even though they signaled in the heading of one of their arguments that they would.

**B. Assertion that New York law applies as the original forum state**

The second argument made by plaintiffs is that New York law applies, even though Mr. Gorham was in his office in California, representing a California resident, then involved in a California bankruptcy, and the representation involved a potential asset of a California bankruptcy estate (the asset being located, apparently, in Nevada) when Mr. Gorham said what he said and wrote what he wrote.

As to this argument, plaintiffs assert that the law of New York must be followed because one of the plaintiffs resides in New York (although his claim is entirely derivative of a Nevada entity<sup>2</sup>) and New York was the jurisdiction where the action was first filed. Therefore, plaintiffs argue that this court must look to the law of the State of New York, and its choice of law jurisprudence in determining what law applies. Unsurprisingly, plaintiffs argue it is New York law, and that the California Anti-SLAPP statute therefore does not apply.<sup>3</sup>

Plaintiffs not only misstate New York law on privilege and its choice of law principles, but of equal importance they also ignore that the State of New York had no personal jurisdiction over Mr. Gorham. Since this issue had been raised when this action was in New York, plaintiffs were obliged to deal with it here as it affects the choice of law.

New York State does not have any interest in applying its laws over Mr. Gorham's California conduct because it had no right to entertain this action as to him in the first instance. Under those circumstances the law of the forum which *does* have jurisdiction applies its own choice of law regime over the forum where the action was initially filed. Applying its own choice of law jurisprudence, California would apply its law, in this case Civil Code § 47(b) and C.C.P. § 425.16.

---

<sup>2</sup> See Complaint at para. 2, pages 2-3. Mr. Rinde is an "owner" of plaintiff CKR Advisors, Inc. The Complaint alleges that CKR Advisors owns the stock certificate at issue in this case, Complaint at para 17, page 6, and that CKR Advisors is a Nevada corporation. *Id.* at para 3, page 4.

<sup>3</sup> Defendant Gorham concedes that the New York Anti-SLAPP law would not permit him to strike the complaint since the New York statute is especially restrictive and does not protect conduct involving access to the courts.

1 While Mr. Gorham first raised the personal jurisdiction issue when he removed the  
2 New York State court action to Federal court,<sup>4</sup> the issue became moot when the Southern  
3 District of New York Bankruptcy Court transferred the action to the Central District of  
4 California. But the presiding bankruptcy judge in New York acknowledged Mr. Gorham  
5 had challenged personal jurisdiction and had made a “colorable claim” of “lack [of]  
6 personal jurisdiction over him.” That issue is now relevant again because of the choice of  
7 law argument made by plaintiffs. Mr. Gorham submits his supplemental declaration on  
8 these issues. It and the applicable law are discussed below.

9 **II.**

10 **MR. GORHAM’S COMMUNICATIVE CONDUCT DURING LITIGATION IS**  
11 **ABSOLUTELY PRIVILEGED UNDER CIVIL CODE §47 (b), WHETHER**  
**CHARACTERIZED AS “AIDING AND ABETTING” OR ANYTHING ELSE**

12 Plaintiffs spend much of the opposition discussing what they claim is misconduct by  
13 Mark Crone about the Akoustis stock certificate, and the business entities in which Mr.  
14 Crone was an owner. But all they can say about Mr. Gorham is that he “aided and abetted”  
15 Mr. Crone – after the fact – by “negotiating” with Lawrence Tofel in New York:  
16 “Plaintiffs’ efforts to resolve the dispute were generally obstructed by Defendant *who was*  
17 *expressly negotiating* for Crone’s exclusive use of the proceeds of the shares’ sales to  
18 satisfy personal liabilities, including those to his ex-wife (defendant Susan Crone) . . .”  
19 (Opposition, p. 4, line 24 to page 5, line 1; emphasis added.)

20 Plaintiffs cite to a telephone call from Mr. Gorham (*id.*, p. 5, lines 24-25), and  
21 representations allegedly made by Mr. Gorham during discussions or in writings when  
22 plaintiffs claim Mr. Gorham represented Ms. Crone<sup>5</sup> (*id.*, p. 6, lines 2, 6-12) as evidence of

23 \_\_\_\_\_  
24 <sup>4</sup> Mr. Gorham removed the action before he was served. As it turns out, he was not served  
25 with process in this action until April 18, 2017 (56 days before Mr. Gorham filed his Anti-SLAPP  
26 motion). See ECF 15, filed on May 2, 2017 showing service on April 18, 2017. By statute, Mr.  
27 Gorham had 60 days after service in which to file his special motion to strike . C.C.P. § 425.16(f).

28 <sup>5</sup> Mr. Gorham denies he ever represented Ms. Crone. Plaintiffs claim Mr. Gorham made the  
representation in writing but they have not provided any document from defendant to support their  
false claim. As Mr. Gorham explained in the declaration supporting his special motion to strike, he  
called Mr. Tofel at his client’s request and in response to a voicemail message Mr. Tofel had left  
(Continued...)

1 Mr. Gorham's "aiding and abetting" conduct. Plaintiffs argue that these were "knowingly  
2 false representations" (*id.*, p. 11, line 22 to page 12, line 8). But it is clear that all of Mr.  
3 Gorham's conduct was communicative and related to (1) the pending Crone Chapter 7  
4 bankruptcy, (2) one of the bankruptcy estate's potential assets, and (3) a possible adversary  
5 proceeding (relating to that asset).

6 Plaintiffs also argue that the statements weren't made in respect to pending or  
7 threatened litigation by eliding in their argument the non sequitur assertion that Mr.  
8 Gorham was acting for Ms. Crone (apparent possessor of the Akoustis stock certificate)  
9 rather than Mr. Crone (*id.*). Even if Mr. Gorham was representing Ms. Crone, it would still  
10 not advance plaintiffs' arguments; no matter whom Mr. Gorham was representing he was  
11 still speaking about matters involved in pending and threatened litigation.

12 In everything plaintiffs claim Mr. Gorham did, even accepting *arguendo* plaintiffs'  
13 malevolent attributions as to motive and falsity, plaintiffs demonstrate only that Mr.  
14 Gorham made statements about a subject of current and potential litigation – the Akoustis  
15 stock certificate.

16 The litigation privilege applies here because it "applies to communications  
17 preliminary<sup>6</sup> to a proposed judicial proceeding, such as a demand letter from an attorney to  
18 a potential adversary." *Dove Audio, Inc. v. Rosenfeld, Meyer & Susman* (1996) 47  
19 Cal.App.4th 777, 781, even if the communicative conduct includes false statements: "[T]he  
20 privilege is absolute and thus evidence of malice is irrelevant; the absolute privilege  
21 protects even statements which are false, fraudulent or motivated by malice." *Aronson v.*  
22 *Kinsella* (1997) 58 Cal.App.4th 254, 270, 68 Cal.Rptr.2d 305. Of course, as Mr. Gorham

23 (...Continued)

24 for the client's ex wife. (See paragraph 10 of Gary J. Gorham Declaration dated June 12, 2017, at  
Special Motion to Strike, page 20, lines 5-11.)

25 <sup>6</sup>  
26 "Preliminary" includes communications before litigation is pending or filed. *Flatley v.*  
27 *Mauro* (2006) 39 Cal.4th 299, 322, fn. 11. So the new, unpleaded allegations about alleged conduct  
and communications by Mr. Gorham set forth in the Opposition (at page 4:11-16 [statements]; page  
28 5:8-12 [filing a demand for arbitration following the New York state court's order that the parties  
arbitrate their dispute]; and page 5:15-16 [allegedly aiding the debtor in filing the bankruptcy  
petition]) also all constitute privileged conduct.



1 testified when he initially filed his motion, Mr. Gorham did nothing more than  
2 inadvertently relay incorrect information concerning the location of the stock certificate,  
3 information which was quickly corrected.<sup>7</sup>

4 Plaintiffs' make a brief and essentially citation-less argument that they can meet the  
5 second prong of the Anti-SLAPP statute. They base that assertion on two claims: First, that  
6 New York law applies (Opposition, page 12, line 11 to page 13, line 10); and second, under  
7 California law Mr. Gorham committed an intentional tort (*id.*, page 13, lines 12-25).  
8 Plaintiffs' arguments are misguided because first, California law clearly applies (although  
9 New York law also immunizes the conduct); and second, the California litigation privilege  
10 immunizes all of Mr. Gorham's conduct, whether an intentional tort or otherwise.

11 As to the claim that Mr. Gorham committed an intentional tort, plaintiffs fail to  
12 discuss the California litigation privilege or the relevant case law at all. They simply ignore  
13 the case law, previously cited, that immunizes communicative conduct in litigation from  
14 tort liability, including "even statements which are false, *fraudulent* or motivated by  
15 malice." *Aronson v. Kinsella, supra*, 58 Cal.App.4th at 270 (emphasis added). Thus,  
16 plaintiffs appear to have generally conceded that if California law applies to Mr. Gorham's  
17 communications, they are privileged and cannot support a tort claim.

### 18 III.

#### 19 NEW YORK LAW IS NOT APPLICABLE TO MR. GORHAM'S CONDUCT

##### 20 A. The New York State courts lacked jurisdiction over Mr. Gorham

21 As set forth in the attached Supplemental Declaration of Gary J. Gorham, Mr.  
22 Gorham is a resident of the State of California (Gorham Decl., para. 2). He owns no  
23 property and does not reside in New York (*id.*). While Mr. Gorham went to law school in  
24 New York and clerked for a Federal judge there, he left New York in 1995 (*id.*, para. 4).  
25 Mr. Gorham is not licensed to practice in the New York State courts (*id.*), has no business

26  
27 <sup>7</sup> See paragraphs 10-18 of Gary J. Gorham Declaration dated June 12, 2017, at Special  
28 Motion to Strike, pages 20-22; and paragraphs 3-5 of Leslie A. Cohen Declaration dated June 12,  
2017 at page 16 of the Special Motion to Strike and Exhibit A.

1 interests in New York and derives no income from that state (*id.*). Likewise, Mr. Gorham's  
2 law firm has no offices in New York (*id.*).

3 All of Mr. Gorham's communications with Lawrence Tofel, plaintiffs' New York  
4 counsel, occurred when Mr. Gorham was in California (*id.*, paras. 5 & 6) and Mr. Gorham  
5 never traveled to New York in connection with the underlying dispute (*id.*, para. 7). As to  
6 the one prior dispute involving Mark Crone, Mr. Gorham's California client, that arose in  
7 New York – because Mr. Tofel improperly filed a lawsuit there in the teeth of a mandatory  
8 California-venued arbitration provision – Mr. Crone was represented in that matter while it  
9 was in New York by New York counsel (*id.*). Only when that action was ordered to  
10 arbitration by the New York State court did Mr. Gorham become involved – by instituting  
11 an arbitration before JAMS in California (*id.*).

12 It is clear that Mr. Gorham had no contacts with New York except those Mr. Tofel  
13 importuned on him by virtue of Mr. Tofel being officed in New York and writing and  
14 calling about a California client of Mr. Gorham's.

15 Under the requirements of “minimum contacts” explicated in *International Shoe Co.*  
16 *v. Washington*, 326 U.S. 310 (1945) and its multitudinous progeny, Mr. Gorham's lack of  
17 any business or personal contacts with the State of New York for the past two decades  
18 would make a New York State court's general assertion of jurisdiction over him  
19 unconstitutional.

20 Plaintiffs may wish to argue that Mr. Gorham's conduct was a tort that had an  
21 “effect” in New York and that there is specific jurisdiction over him for his conduct. But  
22 that argument is also conclusively foreclosed to them under the holding in *The Eastboro*  
23 *Foundation Charitable Trust v. Penzer*, 950 F.Supp.2d 648 (S.D.N.Y. 2013) and cases it  
24 cites.

25 In *Eastboro*, plaintiffs brought an action against a New Jersey developer, Joshua  
26 Rothenberg, and his attorney, Abraham Penzer, for various torts, including the “core  
27 allegation” that Rothenberg transferred an asset to Penzer's New Jersey trust account,  
28

1 which Penzer then paid to Rothenberg. (950 F.Supp.2d at 651.) Penzer moved to dismiss  
2 the action as to him for lack of personal jurisdiction.

3 Even though Penzer was admitted as a lawyer in New York State and had appeared  
4 there as recently as 1994 (*id.*, at 653), the court concluded that he did not practice in New  
5 York since his law firm, its employees and the other accoutrements of a law practice were  
6 all located in New Jersey. (*Id.*) As a result, New York did not have general jurisdiction over  
7 him. (*Id.*, at 658.)

8 As to specific (transaction) jurisdiction, plaintiffs alleged there was one meeting in  
9 New York to discuss the questioned transactions. The court found the meeting was not  
10 “sufficiently significant to establish a basis for personal jurisdiction.” (*Id.*, at 661.)

11 The *Eastboro* Court also cited long standing New York law that contacts by out of  
12 state lawyers with New York lawyers – including letters and telephone calls – is insufficient  
13 to create jurisdiction in New York (*id.*, at 663), citing and quoting the holdings in, *inter*  
14 *alia*, *Mayes v. Leipziger*, 674 F.2d 178, 185 (2d Cir.1982)<sup>8</sup> and *Forgash v. Paley*, 659  
15 F.Supp. 728, 730-31 (S.D.N.Y.1987).<sup>9</sup> The holdings in those cases are conclusive: letters  
16 and telephone calls to New York alone are insufficient to invoke in personam jurisdiction in  
17 New York State.

18 As mentioned in the Introduction, when Mr. Gorham removed the state court action  
19 to Federal court, he challenged the New York courts’ assertion of jurisdiction over him. It  
20 was a subject of the transfer motion when the case was pending in the Southern District of  
21 New York’s Bankruptcy Court and remarked upon by the New York bankruptcy court  
22 judge. A true copy of the transcript of the New York bankruptcy court proceeding is  
23

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24 <sup>8</sup> “New York courts would [not] exercise jurisdiction solely on the basis that the defendants,  
25 from California, . . . sought the wherewithal (i.e., funds, authority, and information) by means of  
26 letters and calls to New York to perform their non-New York services.”

27 <sup>9</sup> “[A] defendant, absent other factors, will not be subject to suit in New York simply because  
28 a New York resident solicited his services, or that the defendant placed telephone calls to and  
corresponded with a New York business in connection with the purchase and sale of out-of-state  
property.”

1 attached to this Reply as Exhibit 1. This Court's attention is invited to page 24, lines 5-10  
2 where Judge Stuart M. Bernstein mooted the jurisdiction claims by transferring the action:

3       The transfer will also serve the convenience of the parties and witnesses.  
4       Mark [Crone], the principal witness, and his Trustee live in California.  
5       The Defendant Gorham is also a California resident and has raised  
6       colorable arguments that the New York Courts lack personal jurisdiction  
7       over him. [Transcript of hearing, Rinde v. Crone, USBC SDNY 17-  
8       01055-smb, May 23, 2017.]

9       Thus, New York State courts did not have in personam jurisdiction over Mr.  
10       Gorham, an issue preserved – and now relevant – in this Court.

11       **B. California law is applied where the transferor court lacks jurisdiction**

12       When the transferor court lacks personal jurisdiction, the law of the transferred  
13       forum is applied as an initial matter as to choice of law. *Muldoon v. Tropitone Furniture*  
14       *Co.*, 1 F.3d 964 (9th Cir. 1993).

15       In *Muldoon*, the plaintiff, an Illinois citizen, was a guest at a Marriott Hotel in San  
16       Diego. He injured himself at the hotel and sued Marriott and the lounge chair manufacturer,  
17       bringing the action in Illinois. The case was subsequently transferred to the Southern  
18       District of California where the district court then applied California's statute of limitations.  
19       An issue arose whether the transferor court had in personam jurisdiction in the first instance  
20       (since application of Illinois' statute of limitations would lead to a different result).

21       The Ninth Circuit Court of Appeals vacated and remanded for a determination by the  
22       district court of that issue, and whether it had been waived. But in so doing, the court held  
23       that "if [defendants] have not waived any objection to the transferor court's in personam  
24       jurisdiction, then *the choice-of-law rules of the transferee jurisdiction should be applied.*"  
25       1 F.3d at 967 (emphasis added). The *Muldoon* Court cited the Fifth Circuit's *per curiam*  
26       decision in *Davis v. LSU*, 876 F.2d 412, 414 (5th Cir. 1989) with approval.

27       Here, of course, Mr. Gorham never waived the jurisdiction issue. He asserted it until  
28       it became moot in New York.

**C. California's choice of law principles would apply its law in this action**

California's choice of law jurisprudence applies a "governmental interest" analysis to determine which state has an interest in governing the conduct of the parties, *McCann v. Foster Wheeler, LLC* (2010) 48 Cal.4th 68, 75, 105 Cal.Rptr.2d 378, and if more than one does, next determining which state's interests would be minimally impaired by the application of the law of the other interested forum (*id.* at 88).

In this case, New York State simply has no interest in governing Mr. Gorham's conduct and so its law need not be consulted. See, e.g. *Frontier Oil Corp. v. RLI Ins. Co.* (2007) 153 Cal.App.4th 1436, 1454, 63 Cal.Rptr.3d 816 discussing that the other jurisdiction must be "potentially concerned" with the conduct.

Since New York has no jurisdiction over Mr. Gorham, and cannot be concerned with governing his conduct, it has no concern about what he does in California, for a California client, concerning a California bankruptcy proceeding, and a potential asset of that bankruptcy which is located in Nevada.

California, on the other hand, applies its statutes and rules and holds its licensed attorneys accountable, not only for their conduct in California, but for their out of state conduct as well. *In re Craig* (1938) 12 Cal.2d 93, 96, 82 P.2d 442. California thus has a strong interest in seeing to it that its laws as they govern attorney and litigation conduct are applied. This is especially true in the context of the litigation privilege, since it was enacted and has been interpreted

to encourage parties to feel free to exercise their fundamental right of resort to the courts for assistance in the resolution of their disputes, without being chilled from exercising this right by the fear that they may subsequently be sued in a derivative tort action arising out of something said or done in the context of the litigation.

*Aronson v. Kinsella* (1997) 58 Cal.App.4th 254, 262, 68 Cal.Rptr.2d 305, citing *Edwards v. Centex Real Estate Corp.* (1997) 53 Cal. App.4th 15, 29, 61 Cal. Rptr.2d 518.

1 New York cannot have a legally cognizable interest in governing the conduct of  
2 those over whom it does not have jurisdiction.<sup>10</sup> Even if it did, we do not know from  
3 plaintiffs' presentation whether there is even a conflict. Plaintiffs have failed to discuss *New*  
4 *York's* litigation privilege in their Opposition despite partly captioning Part III A of their  
5 argument with the claim that "The Conduct of Defendant is Not Privileged Under New  
6 York Law."<sup>11</sup> This is puzzling since "[t]he first step in the analysis of an asserted conflict  
7 of laws is to determine whether a choice of law by the court is actually required." *Nedlloyd*  
8 *Lines B.V. v. Superior Court (Seawinds Ltd.)* (1992) 3 Cal.4th 459, 477, 11 Cal.Rptr.2d  
9 330. Plaintiffs never took that step.

10 If plaintiffs had discussed New York law this Court would have been informed that  
11 New York also acknowledges the litigation privilege. See, e.g., *Mosesson v. Jacob D.*  
12 *Fuchsberg Law Firm*, 257 A.D.2d 381, 683 N.Y.S.2d 88, 89 (1999) ("[A] statement made  
13 in the course of legal proceedings is absolutely privileged if it is at all pertinent to the  
14 litigation."). New York's highest court has also held that statements made in good faith  
15 anticipation of litigation are also absolutely privileged. *Front, Inc. v. Khalil*, 24 N.Y.3d 713,  
16 715, 719-720, 28 N.E.3d 15, 4 N.Y.S.3d 581 (2015). Calling Mr. Gorham's conduct "aiding  
17 and abetting" (Opposition, p. 8, lines 4-5), is intellectually disingenuous when it consisted  
18 solely of "absolutely privileged" litigation communications under New York law.

19 Turning to the California Anti-SLAPP statute, it evokes strong public policy  
20 concerns. The Second Circuit Court of Appeals, when recently weighing California and  
21 New York law on that point, has held that California courts would apply the California  
22 Anti-SLAPP statute under a governmental interest analysis when determining whether to  
23 apply California or New York law. See *Liberty Synergistics, Inc. v. Microfold Ltd.*, 718

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24  
25 <sup>10</sup> See discussion in subpart D, below, at p. 13, concerning *GlobalNet Financial.com v. Frank*  
*Crystal & Co.*, 449 F.3d 377 (2nd Cir. 2006).

26 <sup>11</sup> The heading appears at Opposition, page 7, line 18. The argument continues for the next  
27 two pages, mentions that New York has a different Anti-SLAPP law (*id.*, page 9, lines 1-9),  
28 mentions that in New York "aiding and abetting" is actionable (*id.*, page 9, line 10 to page 10, line  
5), but never mentions the parameters of New York's litigation privilege or discusses it at all.

1 F.3d 138, 147-148. Reversing the district court, the Court of Appeals explained the strong  
2 California interests as follows:

3       The nature of the anti-SLAPP rule is clear. According to the Supreme  
4       Court of California, “[t]he point of the anti-SLAPP statute is that you  
5       have a right not to be dragged through the courts because you exercised  
6       your constitutional rights.” *Varian Med. Sys., Inc. v. Delfino*, 35 Cal.4th  
7       180, 193, 25 Cal.Rptr.3d 298, 106 P.3d 958 (2005) (quotation marks  
8       omitted). Accordingly, “[t]he protections afforded by the anti-SLAPP  
9       statute against the harassment and burdens of litigation are in large  
10      measure lost if the petitioner is forced to litigate a case to its conclusion  
11      before obtaining a definitive judgment through the appellate process.”  
12      [¶] California's anti-SLAPP rule reflects a substantive policy favoring  
13      the special protection of certain defendants from the burdens of  
14      litigation because they engaged in constitutionally protected activity.

15       **D. New York choice of law principles also would apply California law**

16       Even if New York choice of law rules were to apply, plaintiffs’ claims must be  
17      determined under the substantive law of California because Mr. Gorham’s conduct  
18      definitionally implicates “conduct-regulating” laws.

19       New York choice of law principles require an “interest analysis” to determine which  
20      jurisdiction has the greatest interest in the dispute. *Schultz v. Boy Scouts of Am., Inc.*, 65  
21      N.Y.2d 189, 197, 491 N.Y.S.2d 90, 480 N.E.2d 679 (1985). “The law of the jurisdiction  
22      having the greatest interest in the litigation will be applied.” *Licci ex rel. Licci v. Lebanese*  
23      *Canadian Bank, SAL*, 672 F.3d 155, 157 (2d Cir. 2012) (quotation and citations omitted).  
24      “Interest analysis is a flexible approach intended to give controlling effect to the law of the  
25      jurisdiction which, because of its relationship or contact with the occurrence or the parties,  
26      has the greatest concern with the specific issue raised in the litigation.” *Id.* at 157-58  
27      (quotation and citations omitted).

28       “In tort-law disputes, interest analysis distinguishes between two sets of rules:  
29      conduct-regulating rules and loss-allocating rules.” *Licci*, *supra* at 158. Conduct-regulating  
30      rules are those that “people use as a guide to governing their primary conduct,” *K.T. v.*  
31      *Dash*, 37 A.D.3d 107, 112, 827 N.Y.S.2d 112, 117 (1st Dep’t 2006), while “[l]oss allocating  
32      rules . . . are laws that prohibit, assign, or limit liability after the tort occurs,” *DeMasi v.*

1 *Rogers*, 34 A.D.3d 720, 721, 826 N.Y.S.2d 106, 108 (2d Dep't 2006) (internal quotation  
2 marks omitted).

3       The alleged fraud and misrepresentation claims against Mr. Gorham are based on  
4 conduct-regulating rules. See *AHW Inv. Partnership v. Citigroup Inc.*, 980 F. Supp. 2d 510,  
5 522 (S.D.N.Y. 2013) (explaining that negligent misrepresentation claims are based on  
6 conduct regulating rules), *aff'd sub nom. AHW Inv. Partnership, MFS, Inc. v. Citigroup*  
7 *Inc.*, 661 F. App'x 2 (2d Cir. 2016). "If conflicting conduct-regulating laws are at issue, the  
8 law of the jurisdiction where the tort occurred will generally apply because that jurisdiction  
9 has the greatest interest in regulating behavior within its borders.'" *GlobalNet*  
10 *Financial.com v. Frank Crystal & Co.*, 449 F.3d 377, 384 (2nd Cir. 2006), quoting *Cooney*  
11 *v. Osgood Mach., Inc.*, 81 N.Y.2d 66, 72, 595 N.Y.S.2d 919, 922, 612 N.E.2d 277, 280  
12 (1993)).

13       In this case, the alleged tort occurred where Mr. Gorham was located, not where the  
14 plaintiffs allegedly sustained their injuries. For example, in *Licci*, the Second Circuit  
15 analyzed New York's choice of law principles in a tort claim against American Express,  
16 which was based in New York, brought by Israeli plaintiffs who alleged that American  
17 Express facilitated wire transfers of funds to Hezbollah, which used the money to conduct  
18 rocket attacks in Israel, injuring the plaintiffs. Plaintiffs asserted that Israeli law governed  
19 their claims because they were injured there; American Express argued that New York law  
20 applied. The Second Circuit held that the claims were based on conduct-regulating rules,  
21 namely "the scope of a bank's duty to protect third parties against intentional torts  
22 committed by the bank's customers." *Licci*, 672 F.3d at 158. The court further held that the  
23 location of plaintiffs when they suffered the injury did not control the outcome because  
24 New York had the greater interest in regulating the conduct of banks located in New York.  
25 *Id.* See also *AHW Inv. Partnership, supra*, 980 F. Supp. 2d at 524 (finding that the goal of  
26 deterring misrepresentations is "best served by applying the law of the site of the  
27 misrepresentations [rather] than by applying the law of the site of the loss.")



1 This principle unquestionably applies with respect to attorneys. In *Cobalt*  
2 *Multifamily Inv'rs I, LLC v. Shapiro*, 857 F. Supp. 2d 419, 433 (S.D.N.Y. 2012), the United  
3 States District Court for the Southern District of New York, applying New York choice of  
4 law principles, found that claims against law firms alleging their participation in a fraud  
5 perpetrated by their client are governed by the substantive law of the jurisdiction where  
6 those firms maintained their offices and were authorized to practice law. *Id.* at 433. In doing  
7 so, the court explained that the allegedly tortious conduct occurred in the jurisdiction where  
8 the attorneys were located. *Id.* Moreover, the jurisdictions where they were located had a  
9 greater interest in “regulating the conduct of the law firms and lawyers licensed to practice  
10 within [their] borders.” *Id.*

11 Mr. Gorham’s conduct at issue indisputably occurred while Mr. Gorham was located  
12 in California. More importantly, California has a greater interest in regulating Mr.  
13 Gorham’s conduct as an attorney than New York. Therefore, New York’s conflict of laws  
14 principles mandate that California’s substantive law applies.

15 Because California substantive law applies to the claims, it also applies to defenses,  
16 including the protections of the Anti-SLAPP law. California has the greater interest in  
17 restricting litigation that is directed toward suits against California attorneys that may chill  
18 the zealous representation of clients in that jurisdiction. More generally, the jurisdiction that  
19 has the greatest interest in the underlying claim also has “an acute interest in the availability  
20 of defenses to those claims.” *Cobalt Multifamily Inv'rs, supra*, 857 F. Supp. 2d at 434.

21 While Mr. Gorham disputes that New York law has to be considered at all because  
22 the New York courts did not have jurisdiction over him in the first instance, if New York’s  
23 conflict of laws principles did apply, this Court should engage in an “interest analysis” and  
24 determine that based on the “conduct-regulating” nature of California’s laws, those laws  
25 (Civil Code § 47(b) and C.C.P. §425.16) should be applied here.

IV.

CONCLUSION

The special motion to strike should be granted.

Despite the prolixity of plaintiffs' presentation, including irrelevant declarations and exhibits, they have not demonstrated that Mr. Gorham's conduct was anything but litigation and pre litigation communicative conduct. Such conduct is absolutely protected by Civil Code § 47(b). It is also clear that this adversary proceeding is a SLAPP seeking to punish Mr. Gorham for representing a client's interests. As a result this action is subject and should be stricken pursuant to the provisions of C.C.P. §425.16.

Dated: June 17, 2017

Respectfully submitted,

GARFIELD & TEPPER  
A Partnership of Professional Corporations

By

SCOTT J. TEPPER  
Attorneys for Defendant Gary Gorham

**SUPPLEMENTAL DECLARATION OF GARY J. GORHAM**

Gary J. Gorham declares:

1. I am an attorney, admitted and licensed to practice law in the State of California. I am a defendant in this adversary proceeding. I submit this supplemental declaration in support of my special motion to strike relating to the issue of “choice of law” raised by plaintiffs in their opposition thereto. I understand the issue is whether California or New York law applies to this action and, specifically, whether California’s litigation privilege and anti-SLAPP law governs and protects my conduct in this action.

2. I am a resident of the State of California. I own no property in the State of New York, and do not reside there, either permanently or temporarily.

3. I am not licensed to practice law in the State of New York (or any state other than California). I have no business interests in the State of New York, and I derive no income from business activities – in the legal profession or otherwise – in the State of New York. My law firm has no office in the State of New York.

4. I did grow up in upstate New York, and attended Syracuse University College of Law, graduating in 1993. After graduating I clerked for two years for Hon. Howard G. Munson, in the United States District Court for the Northern District of New York. Toward the end of my tenure in that position I was admitted to the bar of the Northern District of New York, but I have never appeared in any action in that district. I moved to Los Angeles, California in 1995, and have lived and practiced law in Los Angeles ever since.

5. While I vigorously dispute the histrionic and false claims against me in plaintiffs’ complaint, at all times during the conduct alleged in the complaint I was physically located in the State of California. Specifically, I have never spoken with plaintiffs’ counsel from any location other than the State of California.

6. All of plaintiffs’ counsel’s emails to me were sent to, and received at, my work email at my law firm in the State of California. To the extent that I responded to plaintiffs’ counsel’s emails, I did so only from the State of California.

1           7. I never travelled to New York in connection with the matters alleged in the  
2 Complaint, nor did I meet with anyone in New York in connection with the matters alleged  
3 in the Complaint. As I have testified in my initial declaration, I initiated an arbitration  
4 proceeding on behalf of Mr. Crone, at JAMS in Los Angeles, California. Mr. Crone had  
5 other counsel in the prior New York action against him, which was sent to arbitration in  
6 California, as the parties' agreement provided.

7           8. In short, I was in California, representing a California client who was the  
8 debtor in a California bankruptcy action, concerning a potential asset of the bankruptcy  
9 estate (which itself is apparently located in the State of Nevada). The only connection I  
10 have to New York is that Lawrence Tofel initiated his inquiries and wrote and called from  
11 New York City, and I responded to him concerning the California bankruptcy and my  
12 client, a California resident.

13           9. When this action was pending in New York, I was represented by New York  
14 counsel. We challenged the jurisdiction of the New York courts to exercise in personam  
15 jurisdiction over me. At the hearing in the Southern District of New York Bankruptcy Court  
16 when this action was transferred to California, Judge Stuart M. Bernstein stated:

17           The transfer will also serve the convenience of the parties and witnesses.  
18           Mark [Crone], the principal witness, and his Trustee live in California.  
19           The Defendant Gorham is also a California resident and has raised  
            colorable arguments that the New York Courts lack personal jurisdiction  
            over him.

20 Transcript of Hearing, Rinde v. Crone, USBC SDNY 17-01055-smb, May 23, 2017, page  
21 24:5-10.

22           10. A true copy of the entire aforesaid transcript is attached to this declaration as  
23 Exhibit 1.

24           I declare, under penalty of perjury under the laws of the United States, that the  
25 foregoing is true and correct and that this declaration is executed this 14th day of July, 2017  
26 at Los Angeles, California.

27  
28  
  
GARY J. GORHAM

## **EXHIBIT 1**

1 UNITED STATES BANKRUPTCY COURT

2 SOUTHERN DISTRICT OF NEW YORK

3 Case No. 17-01055-smb

4 - - - - - x

5 RINDE et al.,

6 Plaintiff,

7 v.

8 CRONE et al.,

9 Defendants.

10 - - - - - x

11  
12 U.S. Bankruptcy Court

13 One Bowling Green

14 New York, NY 10004

15  
16 May 23, 2017

17 10:38 AM

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21 B E F O R E :

22 HON STUART M. BERNSTEIN

23 U.S. BANKRUPTCY JUDGE

24  
25 ECRO: KAREN

1     Hearing re:   Motion to Transfer Venue

2

3     Hearing re:   Joint Motion to Extend Time for Defendants Gary  
4     Gorham and Susan Crone to Answer or otherwise Respond to  
5     Complaint

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25     Transcribed by:   Sonya Ledanski Hyde

1     **A P P E A R A N C E S :**

2

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22    **BY:   GREGORY A. BLUE**

23

24

25



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5  
6       **BY:   LAWRENCE E. TOFEL**

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1 P R O C E E D I N G S

2 THE COURT: "Rind," or "Rinday," versus Crone.

3 How is it pronounced?

4 MR. BLUE: Rinde, Your Honor.

5 THE COURT: Rinde? Okay.

6 MR. BLUE: Good morning, Your Honor. Gregory  
7 Blue, Riker, Danzig, Scherer, Hyland & Perretti, for the  
8 Defendant, Gary Gorham.

9 THE COURT: Good morning.

10 MR. HORGAN: Morning, Your Honor. John Horgan  
11 from Ellenoff Grossman & Schole for Defendant Susan Crone.

12 THE COURT: Has she answered?

13 MR. HORGAN: No, Your Honor. We have had a motion  
14 -- one of the motions that's on today is a joint motion by  
15 Mr. Gorham and Ms. Crone to extend their time for answering  
16 or moving in response to (indiscernible).

17 THE COURT: Okay, but she was served, right?

18 MR. HORGAN: She was. Well, for the purposes of  
19 this, we'll say she was served on April 18.

20 THE COURT: But I mean she was served with the  
21 summons and complaint in State Court, wasn't she?

22 MR. HORGAN: Yes, Your Honor.

23 THE COURT: All right.

24 MR. BENZIJA: Good morning, Your Honor. Walter  
25 Benzija, Halperin Battaglia Benzija, on behalf of CKR Global

1       Advisors and Jeffrey Rinde.

2               MR. TOFEL: Good morning, Your Honor. Lawrence  
3       Tofel of Lawrence Tofel PC for Mr. Rinde and Global  
4       Advisors.

5               THE COURT: Morning.

6               MR. TOFEL: Good morning.

7               THE COURT: Let me hear the venue motion.

8               MR. BLUE: Yes, Your Honor. Gregory Blue. That's  
9       my venue motion.

10              THE COURT: Okay.

11              MR. BLUE: Your Honor, the case belongs in  
12       California, as we've laid out in our papers. The basis for  
13       removal in the first instance was that the claims here were  
14       very likely to have an effect on the bankruptcy of Mark  
15       Crone pending in the Central District of California.

16              THE COURT: How will they affect the Crone  
17       bankruptcy?

18              MR. BLUE: Well, there are a number of ways in  
19       which they'll affect it that have been highlighted in the  
20       last few days by the fact that the Trustee in that case has  
21       brought a claim saying that the very stock certificate --  
22       the stock that's at issue in this case should not be taken  
23       by the Plaintiffs here and sold because that will have a  
24       detrimental effect on the estate.

25              THE COURT: Well, are you saying that the Akoustis

1 -- that's A-K-O-U-S-T-I-S -- stock is property of Mark  
2 Crone's estate?

3 MR. BLUE: As to what I'm saying for the purposes  
4 of today, Your Honor, I don't know the answer to that. But  
5 I do know that there are claims that the Akoustis stock may  
6 be. So, for instance, in the complaint that was brought in  
7 the State Court action, said there are contradictory things  
8 said in the bankruptcy schedules.

9 THE COURT: I've read the State Court complaint.

10 MR. BLUE: Right.

11 THE COURT: I know the Trustee's position in the  
12 State Court complaint.

13 MR. BLUE: Sure. So, I think it's fair to say  
14 that what exactly was transferred to Susan Crone is not  
15 really clear from what was in the bankruptcy schedules of  
16 Mr. Crone, from what was in the divorce proceeding, what was  
17 transferred. But what I will say is --

18 THE COURT: But he didn't transfer the Akoustis  
19 stock. He didn't own it.

20 MR. BLUE: Well, but --

21 THE COURT: He transferred his interest in Global  
22 Advisors, as --

23 MR. BLUE: Well, but there's another factor here,  
24 which is that he -- there's no dispute, and I think what  
25 gave rise to this is he actually transferred physical

1 possession of the stock certificate to Susan Crone, which  
2 indicates to me that he believed he had some sort of  
3 possessory right to the stock certificate, and thus the  
4 ability to physically transfer that to Susan Crone.

5 Now, he may or may not have. But I think that  
6 whether he did have the right, because he had some  
7 possessory interest in it, is something that should be  
8 decided in the context of his bankruptcy case.

9 THE COURT: Mm hmm. Okay. But tell me -- all  
10 right, that's the jurisdictional issue. Tell me why it's in  
11 the best interests of the parties and the witnesses to  
12 transfer.

13 MR. BLUE: Sure. Your Honor, the best interest of  
14 the parties and witnesses is that Mr. Gorham, who I  
15 represent, I'm most concerned with here, is --

16 THE COURT: Who did he represent in this?

17 MR. BLUE: He represented Mark Crone, early on.  
18 He filed the arbitration in California and represented Mark  
19 Crone. He's a California attorney. He does not have a  
20 connection to New York. Mr. Crone, obviously, is in  
21 California, who, at the center of all these allegations, is  
22 going to be essential to determining these.

23 Now, with the filing of the Trustee's complaint,  
24 Susan Crone was named as a Defendant. She certainly will  
25 already be in the Central District of California, defending

1 the Trustee's complaint. The Trustee also named the  
2 corporate entity here, which will already be in the Central  
3 District of California and will need to litigate those  
4 issues there, not to mention the fact that --

5 THE COURT: Central District.

6 MR. BLUE: Central District, I apologize, and not  
7 to mention that the two Plaintiffs here put in a notice of  
8 appearance in the Central District of California. There's  
9 no doubt that, because of the Trustee's complaint, these  
10 issues are going to be litigated there. Whatever the merits  
11 of the Trustee's claim, whatever the ultimate resolution,  
12 they will be there.

13 It frankly makes no sense to have it litigated  
14 there and here, whether in Bankruptcy Court or State Court.  
15 It's a waste of judicial resources, it's a great imposition  
16 on the parties, and the case should be transferred to the  
17 Central District of California.

18 THE COURT: Thank you.

19 MR. BENZIJA: Thank you, Your Honor. We obviously  
20 disagree with the statement, with respect to both the  
21 jurisdictional and the best interest. On the jurisdictional  
22 side, Your Honor, I believe the waters have been quite  
23 muddled here. But, at the heart of it, the action that was  
24 filed before Justice Ramos in State Supreme Court against  
25 Susan Crone and her lawyers involved an effort by a non-

1 Debtor here, Global Advisors, to take possession of its  
2 property, the stock certificate of Akoustis.

3 THE COURT: What's it going to do with the  
4 property?

5 MR. BENZIJA: Once it obtains -- once the entity,  
6 the non-Debtor here, obtains the stock certificate, it will,  
7 pursuant to state law, seek a wind-down of its affairs, and,  
8 in so doing, liquidate its assets.

9 THE COURT: But don't you need a majority vote of  
10 shareholders to wind down the affairs? And how can you do  
11 that?

12 MR. BENZIJA: Yes, Your Honor. And that is a  
13 sticking point with respect to the ultimate wind-down. But  
14 the point here is that it will be done in accordance with  
15 the state law proceedings. It is, in essence, a dispute  
16 between non-Debtors.

17 What the Trustee and what Mr. Crone is attempting  
18 to do here is to interject a possibility that, at best, Your  
19 Honor -- and I'm going to explain the other issue as well,  
20 but that --

21 THE COURT: The jurisdictional issue is  
22 conceivable effect.

23 MR. BENZIJA: Right.

24 THE COURT: I agree with you that the Akoustis  
25 stock is not property of Mark Crone's estate. But that

1 doesn't mean that it's not -- the dispute in this case is  
2 not related to his bankruptcy case.

3 MR. BENZIJA: Your Honor, the only -- the  
4 distinction I'm going to make is that, look, the Trustee has  
5 to take its Debtor as he finds him. As of the -- as of this  
6 time, that interest in the stock, meaning the interest in  
7 Global, which owns the stock, was transferred to Ms. Crone,  
8 pursuant to a marital settlement agreement in Connecticut  
9 Court. At the moment, all the Trustee has is a potential  
10 action to try to undo the transfer that was effectuated  
11 through that.

12 THE COURT: So, why couldn't that have a  
13 conceivable effect on the (indiscernible)?

14 MR. BENZIJA: Well, here's why.

15 THE COURT: It's a very low threshold.

16 MR. BENZIJA: Absolutely, Your Honor. It is an  
17 extremely low threshold. And the argument there is that, if  
18 the Trustee succeeds and obtains the shareholder interest in  
19 Global, then it becomes a shareholder of a non-Debtor. And  
20 it has its rights, pursuant to state law, with respect to  
21 what any other shareholder would have. Does that  
22 shareholder have a right to direct or to otherwise interject  
23 itself within the context of wind-down or liquidation?

24 THE COURT: Well, I haven't seen the articles of  
25 incorporation, but what -- your ultimate problem is you



1 don't have a majority vote. And I don't know if you're ever  
2 going to be able to get a majority vote.

3 MR. BENZIJA: One of the allegations that have  
4 been made in the complaint that was recently filed in the  
5 Central District of California was that, as a result of Mark  
6 Crone's unilateral, and we believe ultra vires, act of  
7 changing the name of Global Advisors to Ascendant, and also  
8 changing the identity of the directors and the officers,  
9 that somehow now that entitles the Trustee to step into the  
10 shoes of Mr. Crone as management, which gives him further  
11 rights.

12 THE COURT: The Trustee's theory is to avoid the  
13 transfer of his interest in Global Advisors. If he is  
14 successful in that, then, presumably, he has the management  
15 and economic rights that Mr. Crone would have in Global  
16 Advisors, right?

17 MR. BENZIJA: Except, Your Honor, that, in this  
18 case, there's more history here that the Trustee does not  
19 cite in his complaint.

20 THE COURT: Well, I've read all the papers. I  
21 understand the history.

22 MR. BENZIJA: Well, there's a waiver issue, Judge,  
23 that wasn't yet briefed, because this was obviously in  
24 response to the complaint. We haven't been heard.

25 THE COURT: What's the waiver issue?

1 MR. BENZIJA: This issue, Mr. Rinde's and Global  
2 Advisors' trick to try to get back the stock certificate,  
3 goes back to about a year worth of litigation.

4 THE COURT: Oh. Oh, okay, I see.

5 MR. BENZIJA: The initial action was against Mr.  
6 Crone, before Justice Ramos. That was eventually sent to  
7 arbitration. But the point is that, during that time, and  
8 during any subsequent litigation, particularly in the  
9 District Court, not one mention, not one issue was raised  
10 over Mr. Rinde's ability to represent Global Advisors or his  
11 authority to do so.

12 In fact, the same counsel appeared -- Mr. Blue  
13 appeared in both instances there. And not one issue was  
14 raised. And, Judge, in that case, why wouldn't have Mr.  
15 Crone, in the initial action, said, "This action needs to be  
16 cut off at its knees; I'm management and I don't agree with  
17 selling the stock"? But it wasn't, Your Honor.

18 And that waiver issue is an important one,  
19 particularly from the standpoint of, if this action is  
20 defended, there will be witnesses that are here now that  
21 will need to be implicated in that.

22 THE COURT: You hadn't mentioned in your papers.

23 MR. BENZIJA: No, Your Honor. We -- in that  
24 instance --

25 THE COURT: You know, this is a motion to transfer

1 venue, and you can't just say, in response, "There are  
2 witnesses."

3 MR. BENZIJA: No, no, I agree, Your Honor. We did  
4 it in response to the Trustee's action, which had not yet  
5 been filed by the time that we filed our papers. So, we beg  
6 the Court's indulgence with respect to that particular  
7 issue.

8 But that clouds the Trustee's complaint, in my  
9 mind, and certainly takes it away from the relatedness, even  
10 at the lowest threshold, because, at the end of the day, if  
11 this non-Debtor entity obtains its property, everyone's  
12 rights are preserved. There's not an issue of where, if the  
13 Trustee is successful, somehow he will be prejudiced by any  
14 action that's taken thereafter. He has recourse.

15 If he believes that there is not a proper Creditor  
16 to be paid, that Creditor, meaning the law firm in this  
17 case, is an entity that's still going on, has 30 offices  
18 around the world; there is recourse. But to drag it into  
19 the Central District of California --

20 THE COURT: It's already there. The Trustee has  
21 sued.

22 MR. BENZIJA: He has sued. And we'll have to deal  
23 with that, Your Honor, for sure. Yeah, the lawsuit was just  
24 recently commenced, but yes.

25 THE COURT: Yeah, I know.

1 MR. BENZIJA: Yes. But the -- you know, and I  
2 understand, Your Honor, the low threshold. But, at the end  
3 of the day, this has been a year and a half effort by the  
4 company to retain its property, which everyone here  
5 recognizes. And I don't think the Trustee has even alleged  
6 that somehow anyone other than the company, the non-Debtor  
7 here, owns the actual stock certificate.

8 Is there a question about relative interest?  
9 Perhaps, but I submit that that relative interest is as  
10 between Mr. Crone and Mrs. Crone.

11 THE COURT: Well, it's between the Trustee and  
12 Mrs. Crone.

13 MR. BENZIJA: The Trustee, I'm sorry, Your Honor.  
14 That's correct. So, on that basis, to transfer and to make  
15 this a related matter, I think, is a stretch, Your Honor.

16 THE COURT: Mm hmm.

17 MR. BENZIJA: And, to just -- I was just informed  
18 that Mr. Gorham as well represents Susan Crone in this case  
19 as well. So, there is -- certainly there's a connection  
20 there, which would justify leaving it here.

21 And, of course, Your Honor, just a note on the  
22 procedure: we have made a motion to remand. We asked for  
23 short notice and that was denied, and then we subsequently  
24 noticed that for a hearing on June 6th, pursuant to the  
25 notice rules. I would submit, Your Honor, that, whatever

1 the decision might be here today on venue, that, because  
2 there is a live controversy or live question of the subject  
3 matter jurisdiction in the Bankruptcy Court, that we -- that  
4 the decision be reserved until such time as (indiscernible).

5 THE COURT: But I have to make that same decision  
6 in connection with whether there's Bankruptcy jurisdiction  
7 in response to this motion. It's -- the jurisdictional  
8 argument is the same argument.

9 MR. BENZIJA: (indiscernible) And the  
10 jurisdictional argument is the principal argument that we  
11 have with respect to (indiscernible).

12 THE COURT: Right. All right. Anything else?

13 MR. BLUE: Yeah, extremely briefly, Your Honor,  
14 two things, one on the waiver argument, because I was  
15 involved in the earlier case. I will tell you that our  
16 papers in that case did raise the issue that there was  
17 equally divided ownership of the corporate entity and  
18 questioned how the entity could have authority to bring the  
19 case.

20 And that sort of remains in the background here,  
21 too. The Trustee claims that he controls the Plaintiff  
22 here. That has to be decided to see whether --

23 THE COURT: He doesn't control him. Again, you  
24 would have recover and void the transfer.

25 MR. BLUE: Correct. And I completely agree, Your

1 Honor. And I think I'll leave it at that. Thank you.

2 THE COURT: Okay. That's it.

3 MR. HORGAN: Your Honor? Your Honor, if I might  
4 make one small point?

5 THE COURT: Sure.

6 MR. HORGAN: Gary Gorham does not represent Susan

7 --

8 THE COURT: Pardon?

9 MR. HORGAN: Gary Gorham does not represent Susan  
10 Crone. Ellenoff Grossman & Schole does. Thank you.

11 MR. TOFEL: Your Honor, if I could just be heard  
12 briefly? Two things, in reverse order. Mr. Gorham, who, no  
13 question, represented Mr. Crone in the year of litigation,  
14 when we reached out for Mrs. Crone after the filing of the  
15 second State Court complaint, he advised us that he  
16 represented Susan Crone. His conduct -- he is a Defendant  
17 in this case because of his conduct on behalf of Mrs. Crone,  
18 at least according to him.

19 Secondly, with due respect to Mr. Blue, who I have  
20 high regard for personally --

21 THE COURT: Yeah, I read the transcript of your  
22 last phone conversation. I know you have high regard for  
23 him.

24 MR. TOFEL: No, no, but my point is --

25 THE COURT: When somebody says that, I say, "Look

1 out."

2 MR. TOFEL: No, no, no. I'm being genuine, Your  
3 Honor. Mr. Blue and I have had a number of conversations.  
4 I have great respect for him personally.

5 THE COURT: But.

6 MR. TOFEL: I disagree with him professionally,  
7 but that -- but there are -- in point of fact, I think Mr.  
8 Blue is incorrect when he says that the issue of Global  
9 Advisors' authority to act at the direction of Mr. Rinde was  
10 raised in the prior litigation. And there have been two  
11 injunctions issued --

12 THE COURT: I'm not deciding that issue.

13 MR. TOFEL: Right.

14 THE COURT: That issue will have to be -- I guess  
15 will have to be decided, to the extent it's an issue. But  
16 it doesn't implicate what I have to decide in terms of the  
17 change of venue motion.

18 MR. TOFEL: Well, I only think that it impacts on  
19 the Trustee -- the bona fides or merits of the Trustee's  
20 complaint, which are conspicuous in its absence from when he  
21 referenced it.

22 THE COURT: Then somebody will make a motion, if  
23 it's appropriate, to dismiss the complaint.

24 MR. TOFEL: At the appropriate time, if we are  
25 served, we'll deal with that.

1 THE COURT: Right.

2 MR. TOFEL: I just want the Court to be aware of  
3 all of the facts, that there have been two injunctions  
4 issued where Mr. Crone never raised the issue.

5 THE COURT: All right. Thank you. Mark Crone,  
6 herein after Mark, and Plaintiff Jeffrey Rinde were partners  
7 in a law firm, CKR Law. They were also equal shareholders  
8 in Plaintiff CKR Global Advisors, herein after Global  
9 Advisors, a Nevada Corporation.

10 Through a series of transactions that Rinde  
11 challenges, Mark changed the name of Global Advisors to  
12 Ascendant Global Advisors in his alleged capacity as  
13 president and sole director of the company. I will continue  
14 to refer to Global Advisors, which will include the  
15 correctly named corporation, whatever that turns out to be.

16 Rinde contends that he and Mark are equal owners  
17 of Global Advisors, and that he, Rinde, is the president and  
18 director. Global Advisors' sole asset is the ownership of  
19 100,000 shares of Akoustis Technologies, Inc., herein after  
20 Akoustis, a public company currently trading on NASDAQ at  
21 approximately \$10 per share. Thus, Global Advisors'  
22 Akoustis stock is worth roughly \$1 million.

23 Susan Crone, herein after Susan, is Mark's ex-  
24 wife. And Leonidas Flangas was or is Susan's lawyer.  
25 Flangas is currently in possession of Global Advisors'



1 Akoustis stock certificate.

2 Defendant Gary Gorham, the Movant herein, was  
3 Mark's attorney. Finally, Mark is a Chapter 7 Debtor in a  
4 case pending in the Central District of California before  
5 Bankruptcy Judge Barry Russell.

6 Prior to Mark's Bankruptcy, he and Susan were  
7 parties to divorce litigation in Connecticut. It appears  
8 that, as part of the resolution of their matrimonial  
9 dispute, Mark transferred his interest in Global Advisors to  
10 Susan.

11 In April 2017, Rinde and Global Advisors commenced  
12 this lawsuit in State Court against Susan, Gorham, and  
13 Flangas. The object of the lawsuit is to recover possession  
14 of the Akoustis stock by Global Advisors and sell it, and  
15 recover money damages in connection with their conspiracy to  
16 deny Global Advisors its rights. Gorham removed the action  
17 from the State Court to the District Court, and the District  
18 Court referred the matter to this Court.

19 Gorham has now moved to transfer the case -- the  
20 adversary proceeding to the California Bankruptcy Court, in  
21 the interest of justice and the convenience of the parties  
22 and witnesses. The Plaintiffs oppose the motion, arguing  
23 that the Bankruptcy jurisdiction is lacking, and, even if  
24 jurisdiction existed, transfer is not warranted.

25 The Plaintiffs have also filed a motion to remand

1 this adversary proceeding to the State Court, but I declined  
2 to consider on it -- consider it on an expedited basis, for  
3 the reasons stated in a memorandum endorsement.

4 In the meantime, Marks' Chapter 7 Trustee, Howard  
5 Ehrenberg, herein after the Trustee, commenced an adversary  
6 proceeding in California Bankruptcy Court on May 17, 2017,  
7 against Susan and Global Advisors. The Trustee contends, in  
8 the main, that Mark's transfer of his interest in Global  
9 Advisors to Susan was fraudulent. He also contends, among  
10 other things, that Rinde has unilaterally made the decision  
11 to sell Global Advisors' Akoustis stock and use the proceeds  
12 to pay debts that are unenforceable against Global Advisors.

13 He further maintains that the value of the  
14 Akoustis stock may increase in value, and its immediate sale  
15 and Rinde's plan to wind down Global Advisors will cause  
16 immediate and irreparable harm to Mark's estate.

17 Thus, he seeks to avoid the transfer of Mark's  
18 interest in Global Advisors and recover that interest for  
19 the benefit of the estate, and to obtain a declaratory  
20 judgment that he as Trustee is Global Advisors' sole officer  
21 and director, with the exclusive power to govern Global  
22 Advisors and to enjoin the sale of the Akoustis shares  
23 and/or using Global Advisors' assets to pay what he claims  
24 are unenforceable debts.

25 I agree with the Plaintiffs that the Akoustis

1 stock is not property of Mark's estate. It is Global  
2 Advisors' property. Nevertheless, the adversary proceeding  
3 is related to Mark's bankruptcy within the meaning of 28 USC  
4 Section 13.34. Of course it will have a conceivable effect  
5 on Mark's bankruptcy case, say -- see In Re Cuyahoga, C-U-Y-  
6 A-H-O-G-A, Equipment Corporation, 980 F2nd 110 at Page 113,  
7 Second Circuit 1992.

8 At issue is who has the right to control Global  
9 Advisors and the disposition of its sole asset, the Akoustis  
10 stock. Rinde owns one-half of Global Advisors, but either  
11 Susan or Mark's estate own the other half. And questions  
12 surrounding the respective rights of the estate and Susan in  
13 Global Advisors, and the Trustee's right to manage and  
14 control it, and specifically his power to control the  
15 disposition of the Akoustis stock, are in dispute.

16 The outcome of this dispute will have a  
17 conceivable effect on Mark's estate because Rinde's efforts  
18 to cause Global Advisors to sell the Akoustis stock and pay  
19 debts that Global Advisors may not owe would adversely  
20 affect the amount of money that can be up-streamed to Mark's  
21 estate, if the Trustee ultimately prevails in his avoidance  
22 action. Furthermore, the Plaintiffs cannot sidestep  
23 Bankruptcy jurisdiction over the dispute raised by their  
24 pleadings by ignoring Mark's bankruptcy and failing to join  
25 his Trustee (indiscernible).

1           Accordingly, the remove proceeding is, at a  
2           minimum, related to Mark's Chapter 7 case, and this Court  
3           has jurisdiction under 28 USC Sections 13.34 and 157, and  
4           the February 1, 2012, standing order of referral.

5           While -- in addition, while the parties have not  
6           briefed Nevada law, it is clear that Rinde, even if the  
7           president and sole director, has the authority to sell  
8           Global Advisors' only asset with a share -- without a  
9           shareholder vote.

10           I further conclude that the litigation should be  
11           transferred to California Bankruptcy Court. Title 28,  
12           Section 1404(a) authorizes the Court to transfer a related  
13           proceeding in the interest of justice and for the  
14           convenience of the parties and the witnesses.

15           The interest of justice will be served because the  
16           Plaintiff's claims could be tried together with the  
17           Trustee's claims, as the common issue is who owns Mark's 50  
18           percent interest in Global Advisors. Moreover, under Nevada  
19           law, unless otherwise provided in the articles of  
20           incorporation, a corporation cannot sell all of its assets  
21           without the affirmative vote of its shareholders, Nevada  
22           Revised Statute Section 78.565(1). Unless that exception  
23           applies, Rinde alone cannot cause Global Advisors to sell  
24           the Akoustis stock.

25           Trying the issues in the same Court where all the

1 parties whose consent might be needed to sell the Akoustis  
2 stock are present may facilitate a resolution. In addition,  
3 trying these issues in separate Courts may lead to  
4 inconsistent results.

5 The transfer will also serve the convenience of  
6 the parties and the witnesses. Mark, the principal witness,  
7 and his Trustee live in California. The Defendant Gorham is  
8 also a California resident and has raised colorable  
9 arguments that the New York Courts lack personal  
10 jurisdiction over him.

11 Rinde is a New York resident, but the Trustee has  
12 joined Global Advisors as a Defendant in his adversary  
13 proceeding, and Rinde will presumably defend Global  
14 Advisors' rights in the California Bankruptcy Court. In  
15 addition, he and Global Advisors have filed a notice of  
16 appearance in Mark's bankruptcy case, and the notice of  
17 appearance indicates that they have retained California  
18 counsel.

19 Flangas, who is in possession of the Akoustis  
20 certificate, is a Nevada resident. Finally, Susan, a  
21 Connecticut resident, has not responded to or opposed the  
22 motion to change venue.

23 Accordingly, the motion to transfer venue to the  
24 Bankruptcy Court in the Central District of California is  
25 granted. With respect to answering the complaint or

1 spending the time, I'd prefer to give the California judge  
2 the option or the decision whether or not that should be  
3 granted.

4 So, what I'll do is I'll adjourn the -- I'll  
5 extend the time pending the transfer of the case to Judge  
6 Russell, who I assume will get it, according to their  
7 assignment rules. And he can make the decision on whether  
8 or not the time to answer should be extended. And let's say  
9 that the time to answer will be 14 days after it's  
10 transferred to Judge Russell. So, there's a gap.

11 I'll also mark off your motion to remand as moot.  
12 And you can submit an order.

13 MR. TOFEL: Thank you, Your Honor. Just for  
14 clarification, and I thank you, Judge, the extension of  
15 time, I assume Your Honor is granting that to the parties  
16 that sought that extension, because --

17 THE COURT: Yes.

18 MR. TOFEL: Mr. Flangas has never appeared or said  
19 a word. I just want to be clear. And I understand that  
20 Your Honor --

21 THE COURT: I am only granting it with respect to  
22 those -- as I understand it, Mr. Flangas is in default  
23 already.

24 MR. TOFEL: Yes, he is, Your Honor.

25 THE COURT: (indiscernible) You know, I guess you

1 can enter a default judgment against him.

2 MR. TOFEL: No, I understand. I just wanted to  
3 make sure Your Honor and I were on the same page.

4 THE COURT: Yes.

5 MR. TOFEL: Thank you, Judge.

6 THE COURT: All right.

7 MR. BLUE: Thank you, Your Honor.

8 MR. BENZIJA: Thank you, Your Honor.

9 MR. HORGAN: Thank you, Your Honor.

10 (Whereupon these proceedings were concluded at 11:03 AM)

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I N D E X

RULINGS

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Motion to Transfer Venue granted	24	23
Motion to Extend Time to Respond extended	25	4
Motion to Remand mooted	25	11



C E R T I F I C A T I O N

I, Sonya Ledanski Hyde, certified that the foregoing  
transcript is a true and accurate record of the proceedings.

Sonya  
Ledanski Hyde

Digitally signed by Sonya Ledanski  
Hyde  
DN: cn=Sonya Ledanski Hyde,  
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Date: 2017.05.25 15:55:34 -04'00'

Sonya Ledanski Hyde

Veritext Legal Solutions

330 Old Country Road

Suite 300

Mineola, NY 11501

Date: May 25, 2017

## PROOF OF SERVICE OF DOCUMENT

I am over the age of 18 and not a party to this bankruptcy case or adversary proceeding. My business address is:  
1801 Century Park East, Suite 2400, Los Angeles, CA 90067

A true and correct copy of the foregoing document entitled (specify): Defendant Gary J. Gorham's Reply in Support of  
His Special Motion to Strike; Supplemental Declaration of Gary J. Gorham; Exhibit

will be served or was served (a) on the judge in chambers in the form and manner required by LBR 5005-2(d); and (b) in the manner stated below:

**1. TO BE SERVED BY THE COURT VIA NOTICE OF ELECTRONIC FILING (NEF):** Pursuant to controlling General Orders and LBR, the foregoing document will be served by the court via NEF and hyperlink to the document. On (date) 07/17/2017, I checked the CM/ECF docket for this bankruptcy case or adversary proceeding and determined that the following persons are on the Electronic Mail Notice List to receive NEF transmission at the email addresses stated below:

Stephen F. Biegenzahn, efile@sfbllaw.com

Leslie A. Cohen, leslie@lesliecohenlaw.com, J'aime K. Williams, jaime@lesliecohen.com,

Brian A. Link, brian@lesliecohen.com

Howard Ehrenberg, ehrenbergtrustee@sulmeyerlaw.com, ca25@ecfbis.com, C123@ecfbis.com

☐ Service information continued on attached page

**2. SERVED BY UNITED STATES MAIL:**

On (date) 07/17/2017, I served the following persons and/or entities at the last known addresses in this bankruptcy case or adversary proceeding by placing a true and correct copy thereof in a sealed envelope in the United States mail, first class, postage prepaid, and addressed as follows. Listing the judge here constitutes a declaration that mailing to the judge will be completed no later than 24 hours after the document is filed.

☐ Service information continued on attached page

**3. SERVED BY PERSONAL DELIVERY, OVERNIGHT MAIL, FACSIMILE TRANSMISSION OR EMAIL (state method for each person or entity served):** Pursuant to F.R.Civ.P. 5 and/or controlling LBR, on (date) 07/17/2017, I served the following persons and/or entities by personal delivery, overnight mail service, or (for those who consented in writing to such service method), by facsimile transmission and/or email as follows. Listing the judge here constitutes a declaration that personal delivery on, or overnight mail to, the judge will be completed no later than 24 hours after the document is filed.

The Hon. Barry Russell

United States Bankruptcy Court

255 E. Temple St., Suite 1660

Los Angeles, CA 90012

Lawrence E. Tofel

Lawrence E. Tofel, P.C.

163 Washington Ave., Suite 5B

Brooklyn, NY 11201

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Los Angeles, CA 90067

☐ Service information continued on attached page

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct

07/17/2017

Date

Scott J. Tepper

Printed Name

Signature